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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE AURELIO AGUILAR, Defendant and Appellant.	E065475 (Super.Ct.No. FVI020914) OPINION

APPEAL from the Superior Court of San Bernardino County. Colin J. Bilash, Judge. Affirmed.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan J. Beale and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Aurelio Aguilar appeals from the trial court's order denying his Proposition 47 petition seeking to reduce his felony conviction for buying or receiving a stolen vehicle under Penal Code[1] section 496d, subdivision (a), to a misdemeanor under section 1170.18. For the reasons set forth below, we shall affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On November 18, 2005, defendant pled guilty to receiving a stolen motor vehicle, a 2001 Honda 300, under section 496d, subdivision (a). The trial court suspended imposition of judgment and placed defendant on three years of felony probation, conditioned on defendant serving 120 days in county jail.

On January 14, 2016, defendant filed a petition under Proposition 47 seeking to reduce his felony conviction to a misdemeanor under section 1170.18. The trial court denied defendant's request finding that defendant "does not satisfy the criteria in Penal Code section 1170.18 and is not eligible for resentencing."

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that the trial court erred in denying his petition under Proposition 47 because the voters intended to include section 496d under Proposition 47. Defendant also contends that excluding section 496d from Proposition 47 violates his right to equal protection.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

In a recent opinion, *People v. Varner* (2016) 3 Cal.App.5th 360, we recognized that "[t]hese issues are currently under review before the California Supreme Court in *People v. Nichols* (2016) 244 Cal.App.4th 681, review granted April 20, 2016, S233055; *People v. Peacock* (2015) 242 Cal.App.4th 708, review granted February 17, 2016, S230948; and *People v. Garness* (2015) 241 Cal.App.4th 1370, review granted January 27, 2016, S231031." (*Id.* at p. 365, fn. omitted.)

A. BACKGROUND REGARDING PROPOSITION 47

On November 4, 2014, voters enacted Proposition 47; it went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Ibid.*)

As relevant here, Proposition 47 amended section 496, buying or receiving stolen property, to provide that if the value of the property at issue is $950 or less, the offense is a misdemeanor. (§ 496, subd. (a).) The previous version of section 496 gave the prosecution discretion to charge the offense as a misdemeanor if the value of the property did not exceed $950 and the district attorney or grand jury determined that so charging

would be in the interests of justice. (Former § 496 [eff. Oct. 1, 2011-Nov. 4, 2014].) In other words, Proposition 47 converted the offense of receiving stolen property valued at $950 or less from a wobbler to a misdemeanor. Proposition 47 did not amend section 496d, the section under which defendant was convicted.

B. DEFENDANT'S ELIGIBILITY FOR PROPOSITION 47 RESENTENCING

Defendant's conviction offense is a wobbler. (§§ 17, subds. (a) & (b), 496d, subd. (a) [the crime of receiving a stolen motor vehicle is punishable as either a felony or a misdemeanor].) Defendant argues that, with the passage of Proposition 47 and its amendment to section 496, his offense now falls within the ambit of section 1170.18. He argues that he is eligible for resentencing under section 1170. We disagree.

Proposition 47's resentencing provision, section 1170.18, subdivision (a) provides: "A person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Thus, in order to be eligible for resentencing, defendant must be a person "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of his offense.

Applying that standard here, we cannot say that defendant would have been guilty of a misdemeanor under Proposition 47 had it been in effect when he received the victim's car. This is because Proposition 47 left section 496d entirely intact, including the wobbler language. In other words, after Proposition 47's passage, the prosecution retains its ability to charge a section 496d violation as a misdemeanor *or a felony*. Because nothing in Proposition 47 affected the prosecution's ability to charge a violation of section 496d as a felony, we conclude that defendant is not a person "who would have been guilty of a misdemeanor" under Proposition 47 and thus is ineligible for resentencing under section 1170.18, subdivision (a).

Defendant contends that Proposition 47's amendment to section 496 commands a different result. He argues the language of that statute is broad enough to encompass, and render a misdemeanor, the act of receiving a stolen vehicle worth $950 or less. Defendant is correct that section 496, subdivision (a) is broad enough to apply to stolen vehicles—indeed, the plain language of the statute applies to "*any* property." (§ 496, subd. (a), italics added.) This, however, was the case both before and after Proposition 47's passage. Proposition 47 did not alter the prosecution's discretion to charge receiving a stolen vehicle under the more general statute (§ 496) or the more specific statute (§ 496d). Because section 1170.18 applies only to those people who "*would* have" been guilty of a misdemeanor, not to those who "*could* have" been guilty of a misdemeanor—if the prosecution in its discretion chose to charge them more leniently—defendant's statutory interpretation argument must fail. Put another way, if we engage in the counterfactual analysis section 1170.18 requires (i.e., what "would" the defendant have

been guilty of if Proposition 47 had been in existence at the time of his offense), the answer is that the prosecution would likely have charged him with the same felony violation of section 496d because exactly the same sentencing considerations apply to defendant's offense before and after Proposition 47.

This issue was considered and rejected in *People v. Varner*, *supra*, 3 Cal.App.5th 360. In that case, the defendant argued that the changes made by Proposition 47 to the crimes of grand theft and petty theft support that "the drafters of Proposition 47 intended to include section 496d." (*Id.* at p. 366.) We rejected the defendant's argument and concluded that "[b]ecause that provision contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies. Additionally, Proposition 47 modified both section 496, receiving stolen property, and added section 490.2. If section 490.2 applied to receiving stolen property offenses, there would be no need to amend section 496." (*Ibid.*)

C. EQUAL PROTECTION

Defendant argues that even if California voters intended to reduce only vehicle *theft* under section 487, subdivision (d)(1) to misdemeanors, while leaving the *receipt* of a stolen vehicle under section 496d a wobbler offense, such discrimination is impermissible under the Equal Protection Clause of the federal and state constitutions. We disagree. Applying rational basis scrutiny, the California Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such

statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838, citing *People v. Batchelder* (1979) 442 U.S. 114, 124-125.) Absent a showing that a particular defendant '"has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation.'" (*Wilkinson*, at p. 839, quoting *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 568-569.) Defendant has not made this showing here.

This issue was also addressed in *People v. Varner*, *supra*, 3 Cal.App.5th 360. There, we stated, "[w]hile the California Supreme Court will ultimately decide the issue, it is reasonable to conclude here that there is no equal protection violation. After the passage of Proposition 47, while it is true a defendant convicted of receiving a stolen vehicle under section 496d cannot obtain relief after Proposition 47, while the same person prosecuted under section 496, subdivision (a) can obtain relief, such disparity does not constitute an equal protection violation. The electorate could consider that only an insignificant number of persons would be prosecuted under section 496d for a vehicle valued under $950. Most would be prosecuted under section 496, subdivision (a) if the 'interests of justice' warranted conviction under that section. Moreover, the electorate could reasonably choose to include section 496, subdivision (a) violations but exclude, for now, violations of section 496d. Based on the foregoing, defendant has failed to show that the exclusion of section 496d from Proposition 47 violated his equal protection rights." (*People v. Varner*, *supra*, 3 Cal.App.5th at p. 370.) We agree with our reasoning in *Varner* and find that defendant's equal protection argument fails in this case. (*Ibid.*)

DISPOSITION

The order appealed from is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.